

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee,)
LLC, and Entergy Nuclear Operations, Inc., for)
amendment of their Certificates of Public Good)
and other approvals required under 10 V.S.A.)
§§ 6501-6504 and 30 V.S.A. §§ 231(a), 248 &)
254, for authority to continue after March 21,)
2012, operation of the Vermont Yankee Nuclear)
Power Station, including the storage of spent-)
nuclear fuel –)

Order entered: 11/30/2010

ORDER RE: DETERMINATION OF ATTORNEY'S FEES AND COSTS

I. INTRODUCTION

In an Order issued June 4, 2010, the Public Service Board ("Board") ruled that Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (jointly, "Entergy VY") must reimburse some of the other parties for certain of their costs in this proceeding. Specifically, we required Entergy VY to reimburse the Vermont Public Interest Research Group ("VPIRG"), the New England Coalition, Inc. ("NEC"), and the Windham Regional Commission ("WRC") "for their attorney's fees and costs reasonably incurred in this Docket as a direct result of Entergy VY's provision of incorrect information regarding underground piping."¹ We further stated that:

We do not at this time determine a specific dollar amount of fees and costs to be awarded, for two reasons. First, those fees and costs are likely to be ongoing, and we cannot determine at this point with any precision the nature and extent of additional proceedings in this Docket. Accordingly, we invite the parties to file proposals for how such ongoing costs should be fairly determined, recognizing

1. Order of June 4, 2010, at 12.

that our award of fees and costs is neither so broad as to require reimbursement for unlimited expenditures nor so narrow as to constrain the parties from following reasonable litigation practices. The parties are encouraged to seek to reach an agreement on such a proposal. Parties' proposals for determination of these ongoing costs shall be filed by June 28, 2010. Responses shall be filed by July 9, 2010.²

On July 2, 2010, Entergy VY and NEC each filed a proposal for determination of costs. On July 8, 2010, Conservation Law Foundation ("CLF") filed a response to Entergy VY's proposal. On July 9, 2010, Entergy VY and NEC each filed a response to the other's proposal.

In today's Order the Board establishes the standard and process for determination of costs.

POSITIONS OF THE PARTIES

NEC proposes that it be compensated by Entergy VY for all ongoing work related to Entergy VY's provision of incorrect information regarding the underground piping. NEC attaches to its proposal a draft schedule, prepared by the Department of Public Service ("DPS"), to illustrate the nature and scope of work for which it proposes reimbursement. The draft schedule includes additional testimony by the parties, related discovery requests and responses, technical hearings, and briefing. The scope of the additional testimony and proceedings would encompass the Supplemental Report ("SR") to the Comprehensive Reliability Assessment ("CRA"), decommissioning, and misinformation and other changes regarding prior Entergy submissions to the Board. NEC contends that it should be reimbursed for all of its attorney, expert, and administrative costs in undertaking the activities reflected in the draft schedule, including review of the SR CRA and other reports that may be filed, preparation and review of testimony, discovery requests and discovery responses, preparation for and participation in hearings, and presentation of legal argument, as well as research and internal communications. All of these activities, asserts NEC, are consistent with reasonable litigation practice and thus are eligible for reimbursement.

NEC further proposes that if the Board were "to open a subdocket to investigate whether Entergy VY witnesses lied under oath or otherwise knowingly provided false information to the

2. Order of June 4, 2010, at 12–13.

Board and the parties," NEC's costs of participation in that subdocket should also be reimbursed by Entergy VY.³

As for the hourly rates for calculating costs, NEC proposes \$150/hour for its attorney, \$75/hour for its experts, and \$20/hour for office staff. NEC contends that these rates are reasonable, and in fact low compared to going rates, and that Entergy VY has agreed that NEC's proposed hourly rates are reasonable.

In its July 2 filing, Entergy VY first notes that it reached agreement on paying attorney's fees and costs with the Vermont Public Interest Research Group ("VPIRG") and the Windham Regional Commission (WRC"). The remainder of Entergy VY's filing addresses its proposal for other parties' requests for reimbursement for attorney's fees and costs, separately addressing past vs. future fees and costs.

With respect to past fees and costs, Entergy VY states that the following fees and costs would be reimbursable:⁴

1. Attorney Review of DPS 1/14/10 Letter and Entergy VY 1/21/10 Response;
2. Attorney Review of Corrected Response to A.VPIRG:ENA-6;
3. Attorney Preparation for and Attendance at 1/27/10 Board Status Hearing, including costs;
4. Attorney Review of Corrected Exhibit EN-MJC-2 and related materials; and
5. Attorney Review of Part 1.0 of the Supplemental CRA Report concerning the AOG system.⁵

Entergy VY further contends that:

The [June 4] Order does not require reimbursement for fees and costs incurred as a result of issues not related to alleged misstatements, including (1) CLF's Motion for Order to Show Cause; (2) work related to the leakage of tritium at the VY Station being considered in Docket No. 7600; (3) fees and costs for work related to that docket; (4) fees and costs related to a review of the Morgan Lewis Report of Investigation or developing motions or arguments related to a request for

3. NEC Proposal at 5.

4. Entergy VY notes that all of these fees and costs have been incurred subsequent to the January 14, 2010, letter from the Department of Public Service ("Department") in which the Department reported that Entergy VY had provided incorrect information regarding the existence of underground pipes at the Vermont Yankee Nuclear Power Station ("Vermont Yankee").

5. Entergy VY Proposal at 2; *see also* Entergy VY Response at 3.

sanctions against Entergy VY; and (5) reliability issues not arising from the alleged misstatements or relating to the Supplemental CRA Report.⁶

Entergy VY claims that NEC is improperly seeking reimbursement for costs from 2009 that could not be attributable to the misinformation about underground pipes because that misinformation only came to light in 2010.

Entergy VY asserts that compensation for the reimbursable past costs would be limited to "actual attorney's fees and costs incurred and paid," and – citing *In re Gadhue*, 149 Vt. 322 (1989), and the Board precedent from Docket No. 6860 – asserts that it would exclude "[p]aid or unpaid staff or volunteer time."⁷ Entergy VY further claims that it does not yet have sufficiently specific information to agree to reimburse costs and fees at this time. According to Entergy VY, the affidavits submitted by NEC to support its request for fees and costs "do not contain sufficient detail to distinguish between those Docket No. 7440 tasks that could have arisen from alleged misstatements . . . and those that did not."⁸

Entergy VY contends that it is premature to attempt to determine what future attorney's fees and costs should be reimbursed because the nature and extent of additional proceedings in this docket are unknown. Entergy VY maintains that the scope of reimbursable expenses is that which it described with respect to past costs. Entergy VY also observes that in Docket No. 6860 and in *Gadhue* the amount of fees and costs subject to reimbursement was determined after the litigation was completed. Entergy VY further contends that it should be allowed to conduct discovery on NEC's claims for reimbursement.

Finally, Entergy VY agrees that the \$150/hour rate that NEC proposes for reimbursement of its attorney's time is reasonable.

Both CLF and NEC oppose Entergy VY's proposal. CLF objects to what it characterizes as "the unnecessarily narrow scope of past and future attorney's fees and costs put forward by Entergy VY,"⁹ and to Entergy VY's attempt to exclude non-attorneys' time. CLF contends that

6. Entergy VY Proposal at 3.

7. Entergy VY Proposal at 3.

8. Entergy VY Response at 4.

9. CLF Response at 1.

the Board should award fees and costs for all future work that is "reasonably incurred as a direct result of Entergy VY's provision of incorrect information regarding underground piping."¹⁰

NEC contends that Entergy VY's cost-reimbursement proposal is too limited. With respect to past fees and costs, NEC asserts that there would have been no activity in this docket since January 2010 if not for Entergy VY's provision of incorrect information about underground pipes. Thus, according to NEC, this litigation would have been over but for the misinformation provided by Entergy VY. NEC notes that its letters responding to Entergy VY's and the Department's initial filings regarding the misinformation are not included within the list of work that Entergy VY proposes for reimbursement. NEC points to its review of the Morgan Lewis report as another example of additional activity beyond that covered by Entergy VY's reimbursement proposal that NEC would not have had to undertake but for the Entergy VY misinformation.

NEC agrees with Entergy VY that it is premature to set the reimbursement for future costs, but objects to Entergy VY's proposal that it be allowed to conduct discovery with respect to any NEC reimbursement request. NEC claims that to allow such discovery would be unreasonable and add to NEC's costs to be reimbursed. (NEC similarly objects to Entergy VY's proposal that it be allowed to conduct discovery into NEC's claims for reimbursement of past costs.)

NEC also opposes Entergy VY's proposal to limit reimbursement to only work performed by NEC's attorney, and not NEC staff or its consultant. NEC contends that the Board's June 4 Order clearly encompassed non-attorney time within the costs to be reimbursed, and further that NEC should be reimbursed for its staff and consultant costs because they are costs that NEC must pay.

In its response to NEC's proposal, Entergy VY reiterates many of the points presented in its own proposal. Entergy VY contends that the scope of issues that NEC has been required to relitigate as a result of Entergy VY's misinformation is captured by the following paragraph in the Executive Summary of the SR CRA:

10. CLF Response at 1 (quoting the June 4 Order at 12).

As a result of the recent discovery of tritium in an Entergy Nuclear Vermont Yankee (ENVY) station monitoring well, the State of Vermont has learned that there are underground piping systems at the ENVY plant that carry radionuclides. Subsequently, ENVY disclosed that there were additional piping sections that meet the requirements of Section 3(a)(7) of Act 189. *Therefore, to completely fulfill its obligations under Act 189, the Department of Public Service (DPS) initiated an independent vertical assessment of the Advanced Off-Gas (AOG) system, which includes underground piping that carries radionuclides.*¹¹

Finally, Entergy VY states that it would accept an award of \$20,000 payable against NEC's affidavits filed on April 16, 2010.

DISCUSSION AND CONCLUSION

Because Entergy VY has settled with VPIRG and the WRC, we need only address NEC's costs at this time.¹² Our June 4 Order established the standard of costs for which Entergy VY must reimburse NEC: "attorney's fees and costs reasonably incurred in this Docket as a direct result of Entergy VY's provision of incorrect information regarding underground piping."¹³

We conclude that Entergy VY has proposed an overly restrictive scope for costs to be reimbursed, in two ways. First, our June 4 Order did not limit the costs only to work performed by NEC's attorney. NEC's staff and consultant costs for otherwise-reimbursable activities are just as much a direct result of Entergy VY's misinformation as are NEC's attorney costs. Nothing in our June 4 Order, our Docket No. 6860 Order or *Gadhue* indicates that when an award of costs is justified it must be limited to only work performed by an attorney. Indeed, the Court in *Gadhue* spoke broadly in noting:

"There is a substantial body of case law which holds that where the wrongful act of one person has involved another in litigation with a third person or has made it necessary for that other person to incur expenses to protect his interests, *litigation expenses, including attorney's fees, are recoverable.*"¹⁴

11. Entergy VY Response at 3, quoting SR CRA at I (emphasis added by Entergy VY).

12. CLF has stated that it anticipates seeking reimbursement "[i]f this proceeding is re-opened." CLF letter of June 16, 2010.

13. Order of June 4, 2010, at 12.

14. *Gadhue*, 149 Vt. at 327, quoting *Albright v. Fish*, 138 Vt. 585, 591 (1980)(emphasis added).

Because the Court in *Gadhue* referred to "litigation expenses, including attorney's fees," it is clear that those reimbursable litigation expenses encompass more than attorney's fees alone. Therefore, we conclude that NEC's reasonable litigation expenses, including work performed by its attorney, staff, and consultants, are subject to the reimbursement requirements of our June 4 Order.

Second, Entergy VY's proposal would exclude work that is reimbursable under our June 4 Order. The appropriate test is whether the additional work would not have been required but for Entergy VY's misrepresentations.¹⁵ Thus, for example, NEC's costs in reviewing the Morgan Lewis report are reimbursable. That report was an investigation commissioned by Entergy VY, and filed in this docket, specifically focusing on Entergy VY's provision of incorrect information about underground piping, including information provided to the parties in this docket.¹⁶ Even though NEC's review of the Morgan Lewis report may not involve the relitigation of an issue, clearly NEC's review would not have been required but for the Entergy VY misrepresentations.

We do anticipate, however, that the bulk of reimbursable costs will involve relitigating issues. As we observed in our June 4 order:

Although we cannot yet determine the extent to which additional proceedings will be required as a result of Entergy VY's failure to provide accurate information regarding underground pipes, it is likely that the parties and the Board will need to revisit a number of significant issues in this proceeding, including but not necessarily limited to decommissioning costs and reliability, all the direct result of Entergy VY's misrepresentations as to the existence of underground piping at Vermont Yankee.¹⁷

To the extent that NEC conducts work revisiting issues in this proceeding as the direct result of Entergy VY's misrepresentations regarding underground piping, its reasonable costs for that work are to be reimbursed by Entergy VY.

We see no reason to withhold reimbursement until the conclusion of this docket. Therefore, we will allow NEC to seek reimbursement on a periodic basis, at the rates that it has

15. To be clear, this may overlap with, but is not the same as, work that would not have been required but for the leaks themselves.

16. See, Morgan Lewis report at 1.

17. June 4 Order at 11–12.

proposed for its attorney, staff, and consultant. NEC may not seek reimbursement more frequently than one request per month.¹⁸ NEC's requests must be supported by time and/or billing records with sufficient detail to demonstrate that the work was carried out for purposes of this docket, reflects reasonable litigation practices, and was the direct result of Entergy VY's misinformation regarding underground piping. Entergy VY shall have ten business days to challenge any NEC reimbursement request. If Entergy VY believes that discovery is necessary to determine the reasonableness or appropriateness of NEC's request, Entergy VY may request permission to conduct such discovery, but Entergy VY's request must specifically explain why the proposed discovery is needed.

We also make the following determination with respect to the past costs for Docket No. 7440 included in NEC's April 19, 2010, filing. All costs incurred prior to 2010 are denied, as they were incurred prior to the disclosure of Entergy VY's misinformation. Of the NEC 2010 fees and costs that are included in NEC's April 9, 2010, filing, the following shall be reimbursed by Entergy VY:

- \$6,644.00 for its attorney, Jared Margolis;
- \$1,102.00 for its staff person, Clay Turnbull; and
- \$13,530.37 for its technical consultant, Raymond Shadis.

So ORDERED.

18. To be clear, if NEC so chooses it may submit its reimbursement requests on a less-frequent schedule.

Dated at Montpelier, Vermont, this 30th day of November, 2010.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 30, 2010

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.